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Egan & Nesbitt

It might have been fun to keep a more detailed diary on the intervention in the Egan and Nesbitt case. It was one of the few things in my life that plausibly may prove to be of real signifigance. But then it might not, and how pretenious a daily diary might then seem to future readers. Let's not talk about where I might find the time. So I'll just remember, and suffer the fralities thereof, not to mention the subterrean tides of self-justifying recontruction. My intentions here are a personal recollection, not a learned memo.

Egan and Nesbitt are a B.C. gay couple who have lived together for forty-five years. They - more correctly Egan - determined to litigate a gay rights case. I don't know the origins of how they came on this one, whether some wiley professional was in on it from the start, but no matter. Their particular complaint was honnest and straight ahead, and conveniently posed profound issues of lesbian/gay equality based on the Charter of rights. This is not the place to review the legal technicalities in detail, but a few of the basics are probably necessary.

The Old Age Security Act provides for pension supplement to a person between 60 and 65 to a who is a "spouse" of some someone over 65. The general intention when the legislation was drafted in the seventies, and herein lies an issue, was to assist assist women whose husband had reached retirement and old age pension but the younger wife had no pension. The definition of "spouse" is a person living with another **of the opposite sex** and known publicly **as husband oand wife**. Egan said, quite logically, why shouldn't my partnership enjoy the same government benefit.

The Charter of Rights guarantees equality for certain enumerated groups, those defined by sex, race, religion etc., but not sexual orientation. It says this guarantee will be extended to others who show discrimination on "analogous grounds". A number of cases in the lower courts have held that sexual orientation is an analogous ground, but so far none in the Supreme Court. The first big issue.

The second issue is whether the definition of "spouse" is a distinction based on sexual orientation. The lower courts had ruled "no" because other groups, cohabiting sisters for example, were excluded as well.

The third issue is whether there is in fact a disadvantage to Egan and Nesbitt. The Crown argues that if you add up all their welfare benefits from other sources where they get benefits as if they are single they in fact come out ahead.

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All this started in for me a year earlier when I attended a meeting of gay and lesbian lawyers called by some others to talk about litigation strategies in gay rights cases. My work on obscenity and censorship I suppose got me invited. I knew nothing about same sex benefits as a queer political issue. I was keen that an organization get rolling to do for gay and lesbian rights what LEAF had done for women's rights. Beyond a vague notion that I was for "equality" and hopeful that the time was ripe for some successful legal contributions to the cause. I was not involved in any of the community organizing around Bill 167 the Ontario "gay rights" bill that was a compendious set of amendments to provincial law to implement a wholesale scheme of equality. One of the group, Susan Ursel, was a leader in all this, a wonderful woman, albeit with the somewhat strident enthusuasm of a latecomer. So the meetings were immediately interesting for all the new politics that I learned. Not the mention the gay rights legal cases that I had been - not exactly ignoring but perhaps oblivious to - because they had no direct bearing on the gay obscenity work I had been doing. I made my ignorance clear from the start, but determined to lend my support to the organizational cause.

The group worked reasonably well with David Corbett de facto leader. We decided that an intervention in the Egan case that was coming up in the Supreme Court of Canada was a good place to start. David recruited the Metropolitan Community Church as a client. We thought it a bit early to seek standing for our group per se since it hadn't even been created. The Church was willing and off we went to Ottawa to get intervention status. Especially after the defeat of Bill 167 the organization side of the group got launched in earnest, so earnest and with so much talent that I bowed out.

One of the strange twists in this early stage was that David Corbett had to disqualify himself as a possible counsel because his firm was acting on the other side of the same issue in another file where their client was the government. To his great credit he continued to work fiercely on our Egan material including substantial financial support through his firm and privately throught the church. So in the early discussions we had to pick other counsel of record. Everyone thought it had to be out counsel. I suggested Ian Scott but he wasn't out enough. I was the oldest and supposed the most visible. So Susan and I were designated, Susan for someone who knew wereof she spoke, and sex balance, and me as figurehead - a greybeard.

We worked quite intensely throught the summer and especially in September and October to prepare a factum. A good number of people were involved and many more consulted. We conceived that we would put before the Court a "Brandeis brief" on the quality of same sex relationships and how similar they are to straight. To this end we canvased all the queer academics of our acquaintance. Interestingly they were extremely unhelpful in locating the kinds of material we needed. In the end the articling students involved in the project, Wendy Snelgrove in my office and Olivia ? in

Susan's found much better material by their own trip to the library. In the end it was David and Susan and I who drafted the Factum in a series of sessions in our boardroom.

The preparation for oral argument was equally intense for two days in Ottawa again with Susan and David.

This whole process of preparation had the most salutory effect. It was a wonderful collaborative effort. Wendy commented that it was different than the internal office dynamic where I am the centre and the source. Here I was just one of many, and indeed the one who brought the least knowledge of the subject area to the discussions. I felt privileged to have been included, to be able to work with people better qualified to deal with this subject than I. Perhaps I contributed to overall coherence, style, consistency and advocacy, but I was learning every inch of the way. It was great for the students as well. The issues are so fresh and the jurisprudence so undeveloped that everyone could become an expert in hurry and make their voice heard.

It was also an excellent effort in balanced sexual politics. Generally I feel that lesbians have greater interest in same sex benefits than the men, notwithstanding that the plaintiffs/appellants were a male couple. After years of feeling adverse to women on the obscenity issue were my clients and myself tended to the libertarian and found most women opposing us it was great to be on the same side and working harmoniously.

As I got into the political demensions of the legal issues they came very much alive. It was one the highlights of my intellectual professional life which I like to think is devoted to the ever shifting boundary between law and politics. Did we really want to achieve the result we sought - that same sex relationships would be treated the same as different sex? Should there be actual marriage as opposed to a domestic contract regime? Should there be a right to sue a same sex patner of three years for support? Were we trying to recreate heterosexual coupledom for gays and lesbians? Weren't we trying to get away from that? Was this mainstreaming run amuk? Was the wonderful diversity of queer rooted in its alienation? Would we ruin everything? Would gay couples join the country club and behave just like them except for the orifice of choice. The high politics were intense.

But I was always confident that it was highly unlikely that any version of even the most successful result would carry equality that far. Our liberal courts would never be that liberal.

Far more important was the social "lesson" to be learned by insisting that society respect - ideally equally respect - queer domestic life. The scheme of legislation that ignored the reality of lesbian and gay couples - the equivilence of lesbian and gay cuoples - lies at the heart of the disparagement of lesbians and gays in contemporary culture. Family is everything, coupledom is supposed to be the only means to fulsome adulthood. While these ideas are flawed they are the fundamental social reality. This was

the dignity issue, and it became my central spark. I came to believe that the gains to achieved in terms of dignity would dramatically undermine homophobia and this far outweighed the risks of excessive mainstreaming that in a dream world lay decades down road.

It also made a deep personal impression on me. Some of the material I read cut to quick. The "closet", so the academics described it, ensnared people in many complex ways. Even those who were "out" were often still governing their lives as if they were not. Or maybe they weren't really. Were "out" gays and lesbians, particularly professionals, restrained in their personal lives to that they would not create embarassing situations. Did they foreswear partners and devote themselves to their work because of social approbation? Like the Anglican priests - ok to say you're a homesexual, but not ok to do anything about it? On the one hand we were denying the myth that lesbians and gays were sex crazed loners incapable of connubial bliss, but on the other hand there was and is reality to that stereotype, and is a reality that is partly, perhaps largely, sustained by the government policy that gays and lesbians can't be couples, can't be human.

Other forces in my life had recently made feel some loneliness and cause me reconsider the virtues of my bachelorhood. So as I pondered all this I came to feel personally oppressed and cheated by social convention in a way that dwelt on before.

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Appearing in the Supreme Court

The highlight of all this has to be appearing in the Supreme Court. No, I would say, it was being there, being part of it, not necessarily being the mouth.

It was a political event, in the highest court in the land. The hearing seemed sympathetic. There was no sense the judges were personally uneasy with the subject. They tormented the crown during his argument. The crowd was decidedly on our side. The feeling was "maybe we won -maybe we won the greatest gay rights case ever, anywhere". It was a good feeling, a feeling that as a lawyer maybe I was exercising some real political influence. In that sense it was the vindication of a career attempting political results before the courts. I will feel good about it even if we don't win. I will be extactic if we prevail.

It was electric in the Court room as the judges picked at the crown. Iaccaboucci asked him plaintiffly to the remember that he had to justify the law against the Charter, not based on its original purpose. Sopinka, L'Hereux-Dube, and Lemer all put point that were taunting if not sarcastic. I wanted to feel sorry for him, being shredded on television in one of the most important cases of the decade. There were points when he had to ask for a pause to recompose himself. But he picked his weakest arguments, and stuck to them. Watching the other side sink was the highlight of the day.

Our strategy in oral argument was to stress that the MCCT did not expect that this case determined the legalities of "gay marriage". We felt this was important to say to Sopinka. Second we highlighted the social science material on the quality of same sex relationships. Third, we determined to call the religious right on some the material they filed.

In my oral presentation the first two went well enough. We were all satisfied that we had chosen well. They were clearly interested.

The third went badly. I ran out of time and decided I could not get through the damning quote and still have time to denounce it, so I determined not to read it but rather refer to it. Lemer interrupted even that to say they had a right of free speech etc.

Strict time limits are a bastard. Nothing like real advocacy. I should have written a strictly timed speech.

Generally I felt quite nervous and have certianly done better on my feet. The physical set up is disadvantagous. The podium is flat and low for a six footer, so you're looking way down to see your text instead of over a lecturn at the judges. It is hard to talk to them they way on would normally expect in court.

Overall I felt disappointed with my "perfomance". But it also was quite obvious that the oral argument form all parties had little real weight in the decision making. One wonders whether they will read our Factums. For all the efforts poured in I certainly hope so. Overall it confirmed my basic instinct that I enjoy the the plotting and preparation of cases as much or more than the always tricky and arbitrary, and sometimes trecherous circumstances of presenting them. Mind you I show no sign of slackening in my desire to be the presenter. Oh the ego!

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